IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 19TH OCTOBER 2007 / 27TH ASWINA 1929

CRL.A.No. 1302 of 2007()

CC.1292/2001 of JUDL.MAGISTRATE OF FIRST CLASS-II, ERNAKULAM

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APPELLANT: COMPLAINANT

K.J.MICHEAL, S/O.JOSEPH, AGED 44 YEARS,
KUNNAKKARA HOUSE, THAMMANAM P.O.,
POONITHURA VILLAGE, KOCHI- 682 032.

BY ADV. SRI.C.A.CHACKO
SMT.C.M.CHARISMA
SRI.N.A.SHAFEEK

RESPONDENTS: ACCUSED & STATE:

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1. M.K.CHANDRAN, S/O.KARUMBAN,
PALATHURUTHIPARAMBIL, LABOUR COLONY
ROAD, THAMMANAM P.O., KOCHI-32.

2. THE STATE OF KERALA,
REP.BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl.A. No. 1302 of 2007

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Dated this the 19th day of October, 2007

JUDGMENT

The appeal is filed by the complainant against the acquittal order passed in C.C.No.1292/2001 on the file of the Judicial Magistrate of the First Class-II, Ernakulam. The learned counsel for the appellant submits that the order under challenge is not in accordance with the principles laid down by this Court in decisions reported in Don Bosco V. Partech Computers Ltd. (2005(2) KLT 1003), G.F.S. Chits & Loans (P) Ltd. V. Rajesh (2006(3) KLT 825) and a decision of the Apex Court reported in Associated Cements Co. Ltd. V. Keshwanand (1998(1) KLT 179 (S.C.).

3. A reading of the impugned order would show that the case was posted on 18-8-2006 for appearance of the appellant for evidence as last chance. However, when the case was called, neither the appellant nor his counsel was present. Hence, the complaint was dismissed and the 1st respondent was acquitted under section 256(1) Cr.P.C. It is submitted that the absence of the appellant was not willful or negligence. It is also

submitted that the appellant was under the bona fide impression that the case had been properly conducting by his counsel, but unfortunately the case was not attended by the counsel, as he was paralised due to brutal attack by goondas. As per the principles laid down in Don Bosco V. Partech Computers Ltd. (Supra), when the presence of the complainant was quite unnecessary and the Magistrate could proceed with the case by adjourning the same even if there was no representation from the counsel, the Magistrate should have adjourned the case, particularly when steps under section 82 and 83 of the Cr.P.C. were pending against the accused. In G.F.S.Chits & Loans (P) Ltd. V. Rajesh (Supra) this Court held that the courts should also bear-in-mind that unmerited, thoughtless disposal gives wrong signal to the society, staking even public confidence in the system of administration of justice. In paragraph 17 of 1998(1) KLT 179 (Supra) the Apex Court held as follows:-

> "17. Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that complainant is absent on a particular day the court must consider whether personal attendance of

> the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

4. Considering the facts and circumstances of the case, this Court is of the view that the order under challenge is not sustainable. Hence, the impugned order is set aside and the matter is remitted to the trial court for fresh consideration.

5. The appeal was admitted by this Court and notice was ordered to the 1st respondent, but there was no appearance. Hence, the trial court shall issue fresh notice to the 1st respondent.

The appeal is allowed as above.

The appellant shall appear before the court below on 15-12-2007

The records of the case shall be forwarded to the trial court forthwith.

K. Thankappan,
Judge.

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It is relelvant to note that only because of the absence of the appellant, the 1st rspondent is dragged to this Court. Hence, it is only proper for this Court to allow a reasonable costs to the 1st respondent. Therefore, the appellant is directed to deposit before the court below an amount of Rs.2,000/- on or before the date of posting of the case. If the amount is deposited, the 1st respondent is permitted to withdraw the same.

K. Thankappan,J.

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Crl.A.349/2003

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Judgment
29-3-2007